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Supreme Court, U.S.
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No. 04-1020

IN THE

Supreme Court of the United States

MEDIA GENERAL, INC.

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY TO BRIEFS IN OPPOSITION

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INTRODUCTION

Respondents do not dispute that the petition presents constitutional issues of exceptional importance; rather, respondents simply insist that the law on those issues is "settled," Br. for the Federal Resp'ts ("U.S. Br.") 15, or "clearly established," Br. in Opp. for Public Interest Resp'ts ("Prometheus Br.") 2. But that is precisely Media General's point: the law on these important constitutional questions is frozen in amber circa 1978, and only this Court—not Congress, the FCC, or the lower courts—is in a position to do anything about it. On each of the three constitutional questions presented in the petition, this Court's decision in *FCC v. National Citizens Comm. for Broad.* ("*NCCB*"), 436 U.S. 775 (1978), establishes not only the law of the land, but the rules of the road for broadcast regulation. For this reason, respondents' suggestion that this Court's review would be "premature" because the Third Circuit remanded the case to the agency, Prometheus Br. 2; *see also* U.S. Br. 12-14, has an Alice-in-Wonderland quality about it. It makes no sense to think that the FCC can meaningfully regulate broadcasting without first knowing the proper legal standard governing broadcast regulation. Respondents' procedural argument thus collapses back on their substantive argument that the law in this area is settled. Indeed, respondents' arguments only prove that, far from being "premature," this Court's return to this area of the law is *overdue* because the premises underlying *NCCB* (and its precursor, *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969)), have long since been eroded. And because there are few issues of greater practical and legal importance to a free society than the extent of government control over media of mass communication, this Court should grant the petition.

I. Respondents' Substantive Objections Are Meritless.

A. The Scarcity Doctrine

As noted above, respondents miss the point by insisting that the scarcity doctrine, which provides the doctrinal underpinning for stripping broadcast media of the robust First Amendment protection afforded to other media, is "good law." U.S. Br. 19; *see also* Prometheus Br. 2-11. Of course it is "good law" in the sense that it has never been repudiated by this Court. The whole point of the petition, however, is respectfully to submit that it is not "good law" in the fundamental sense that it represents a proper interpretation of the First Amendment.

Precisely because the scarcity doctrine remains "good law" in the first sense, the lower courts are *not* free to hold that it no longer remains "good law" in the second sense, and hence it is only natural that "there is no conflict among the circuits regarding the scarcity doctrine." Prometheus Br. 9 (capitalization modified). But lower-court judges *are* free to opine that the doctrine "makes no sense now," *Action for Children's Television v. FCC*, 58 F.3d 654, 673 (D.C. Cir. 1995) (*en banc*) (Edwards, C.J., dissenting), and a wide array of them—from Judge Edwards to Judge Bork, from Judge Arnold to Judge Williams—have done so. *See* Pet. 14-17. This sustained criticism from prominent lower-court judges across the jurisprudential spectrum underscores that this Court's review of the ongoing validity of the scarcity doctrine is not only warranted, but long overdue. Indeed, this Court itself noted over a decade ago that the scarcity rationale has been "criticized ... since its inception," *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 638 & n.5 (1994) (citing courts and commentators), and signaled a willingness to reconsider the doctrine's validity, *see id.* at 637 ("[T]he rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation, *whatever its validity in the cases elaborating it*, does not apply in the context of cable regulation.") (emphasis added).

Respondents insist, however, that review is unwarranted on the ground that neither the FCC nor Congress has sent a "signal" that it is time to discard the scarcity doctrine. U.S. Br. 19-21; Prometheus Br. 4-8. Putting aside the threshold anomaly of waiting for government regulators to send a "signal" that greater constitutional scrutiny of their regulations is warranted, the FCC unequivocally sent such a "signal" in *In re Compl. of Syracuse Peace Council*, 2 F.C.C.R. 5043 (1987), *pet. for review denied*, 867 F.2d 654 (D.C. Cir. 1989). The United States now tries to disavow that "signal," arguing that it applied only to the fairness doctrine. *See* U.S. Br. 19-20. But that argument is demonstrably incorrect: the FCC in *Syracuse Peace Council* specifically responded to this Court's invitation for a "signal" that the time had come to reconsider the scarcity doctrine: "[I]n response to the question raised by the Supreme Court in *League of Women Voters*, we believe that the standard applied in *Red Lion* should be reconsidered and that the constitutional principles applicable to the printed press should be equally applicable to the electronic press." 2 F.C.C.R. at 5053.[1] If anything, the FCC's current attempt to disavow *Syracuse Peace Council* only underscores that this Court cannot

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[1] *See also* 2 F.C.C.R. at 5048 ("[T]he extraordinary technological advances that have been made in the electronic media since the 1969 *Red Lion* decision, together with a consideration of fundamental First Amendment principles, provide an ample basis for the Supreme Court to reconsider the premise or approach of its decision in *Red Lion*."); *id.* at 5053 ("[T]he scarcity rationale developed in the *Red Lion* decision and successive cases no longer justifies a different standard of First Amendment review for the electronic press."); *id.* at 5054 ("We do not believe that any scarcity rationale justifies differential First Amendment treatment of the print and broadcast media."); *id.* at 5055 ("We simply believe that, in analyzing the appropriate First Amendment standard to be applied to the electronic press, the concept of scarcity—be it spectrum or numerical—is irrelevant."); *id.* at 5058 ("[T]he dramatic transformation in the telecommunications marketplace provides a basis for the Court to reconsider its application of diminished First Amendment protection to the electronic media.").

rely on the agency to declare that the time has come for greater constitutional scrutiny of agency action.

At the end of the day, respondents' argument boils down to the proposition, articulated by the Third Circuit below, that "[t]he abundance of non-broadcast media does not render the broadcast spectrum any less scarce." App. 47a; *see also* U.S. Br. 16-18; Prometheus Br. 8-9. That proposition, as explained in the petition, ignores the critical point that technological advances have eroded the boundaries between broadcast and non-broadcast media, so that it no longer makes sense to subject broadcasting to a distinct regulatory regime. Thus, even if available broadcast spectrum were static (which it is not, *see, e.g., Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291, 293-94 (D.C. Cir. 2003)), broadcasting cannot sensibly be analyzed in isolation from other media. At the very least, the time has come for this Court to reconsider this important issue.

B. Due Process/Equal Protection

Respondents next argue that Media General's due process/equal protection challenge—based on the fact that newspapers are the *only* non-broadcast medium subject to broadcast ownership restrictions—is again foreclosed by *NCCB*. *See* U.S. Br. 22-24; Prometheus Br. 11-14. Again, the Third Circuit agreed, *see* Pet. App. 45-46a, and again that point only underscores that the time has come to revisit *NCCB*.

The federal respondents turn Media General's position on its head by asserting that Media General "conten[ds] that the FCC was constitutionally required to apply the cross-media rule to cable systems and Internet websites." U.S. Br. 23. That is not true. Media General is not advocating greater government regulation of *any* speech; rather, Media General is simply noting that the government cannot justify discriminatory regulation of *newspapers* when the same justification would also apply to other non-broadcast media.

Respondents insist, however, that newspapers legitimately differ from cable and the Internet, because only newspapers provide "'*local* news and information.'" U.S. Br. 22 (quoting Pet. App. 520a) (emphasis added); *see also* Prometheus Br. 12. Respondents then assert, based on *NCCB*, that this difference justifies applying the cross-ownership rule to newspapers. *See* U.S. Br. 24; Prometheus Br. 11-12. But even if that assertion were factually correct, which it is not, it would only underscore the need to reconsider *NCCB*. The Third Circuit expressly declined to consider this point, saying that it was bound by *NCCB*, and that this Court alone could decide whether *NCCB*'s premises have been eroded. *See* Pet. App. 46a ("We decline ... to disregard Supreme Court precedent because of changing times ... [I]t is the Supreme Court's prerogative to change its own precedent."). Accordingly, unless and until this Court reconsiders *NCCB* on this ground too, the agency and the lower courts will continue to regulate newspaper/broadcast cross-ownership as if nothing had changed since 1978.

C. Content Neutrality

Respondents finally assert that Media General's content-neutrality argument does not merit review "because this Court has already addressed the question, holding that newspaper/broadcast cross-ownership regulations 'are not content related.'" Prometheus Br. 15 (quoting *NCCB*, 436 U.S. at 801); *see also* U.S. Br. 21-22. Again, however, that assertion only underscores that the time is ripe to reconsider *NCCB*.[2]

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[2] Respondents Prometheus *et al.* (although tellingly not the United States) assert in passing that "review of this argument is inappropriate because it was not *addressed* in the decision below." Prometheus Br. 15 (emphasis added). That assertion is manifestly incorrect; Prometheus does not dispute that Media General pressed this argument below, so it is squarely presented for this Court's review. *See, e.g., United States v. Wells*, 519 U.S. 482, 488 (1997) (noting "this Court's traditional rule that we may address a question properly presented in a petition for certiorari if it was [1] pressed in *or* [2] passed on by the Court of Appeals") (emphasis and brackets added; internal

Respondents cannot, and do not, deny that the whole point of cross-ownership restrictions is "to promote viewpoint diversity." Pet. App. 225a; *see also id.* at 453a ("[W]e continue to believe that diversity of ownership can advance our goal of diversity of viewpoint."). Whether or not the restrictions actually serve that goal—a most dubious proposition—there can be no doubt that the goal itself is explicitly content-based.

Respondents insist that newspaper/broadcast cross-ownership restrictions are content-neutral because they are not based on "'disagreement with the *message*'" conveyed. U.S. Br. 22 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (emphasis added)); *see also* Prometheus Br. 15. But that simply blurs content-neutrality with viewpoint-neutrality. The very premise here is that broadcast stations owned by newspapers have a distinctive "viewpoint." Even assuming that this premise is *viewpoint* neutral, it certainly is not *content* neutral; to the contrary, it is based on assumptions about the content of the speech. As *Ward* makes clear, a regulation is content-neutral only if "it is *justified* without reference to the content of the regulated speech." *Ward*, 491 U.S. at 791 (internal quotation omitted; emphasis added in *Ward*). Because newspaper/broadcast cross-ownership restrictions are expressly justified by reference to the content of the speech—"diversity of viewpoint," Pet. App. 453a—they are not content neutral. And because *NCCB*, without any analysis, simply declared that such restrictions are "not content related," 436 U.S. at 801, a declaration that is impossible to square with this Court's other pronouncements on the topic, *see, e.g., Consolidated Edison Co. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 530, 537 (1980); *Ward*, 491 U.S. at 791, and that has foreclosed the lower courts from concluding otherwise, *see, e.g., Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148, 168 (D.C. Cir. 2002), this Court should review this issue too.

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quotation omitted); Robert Stern *et al.*, *Supreme Court Practice* § 6.26, at 421 (8th ed. 2002).

II. Respondents' Procedural Objection Is Meritless.

In addition to their substantive objections to certiorari, respondents also advance a procedural objection: that review now would be "premature" because the Third Circuit vacated the FCC's revised cross-ownership restrictions and remanded the matter to the agency. Prometheus Br. 2; *see also* U.S. Br. 12-14. If ever there were a perverse argument, this is it.

Although this is now the year 2005 (and a decision by this Court presumably would not be forthcoming until the year 2006), at issue here is the *2002 Biennial Regulatory Review*. Media General's position all along, since the beginning of this process more than three years ago, has been that restrictions on newspaper/broadcast cross-ownership are subject to heightened constitutional scrutiny. The FCC, relying on *NCCB*, squarely rejected that position, *see* Pet. App. 215-19a, as did the Third Circuit, also relying on *NCCB*, *see* Pet. App. 45-48a. Accordingly, whether that position is right or wrong is now squarely presented here, and there is no reason to delay the resolution of these threshold constitutional questions.

Indeed, the core fallacy underlying respondents' procedural argument is that the FCC will be able to adopt revised newspaper/broadcast cross-ownership restrictions on remand without any consideration of the proper constitutional standard of review. That is simply not so. Reasoned and responsible regulation obviously requires appreciation of the relevant constitutional constraints. *See, e.g.*, Pet. App. 215a ("The ownership rules we adopt in this proceeding must be consistent ... with the First Amendment."). Thus, the agency cannot properly implement any remand (and the Third Circuit cannot properly review any such implementation) without knowing whether *NCCB* continues to provide the governing legal principles. The constitutional issue, in other words, is not going away. Unless this Court grants the petition, *NCCB* will govern any further proceedings on remand. Thus, what respondents are

really requesting is not avoidance of constitutional issues, but resolution of constitutional issues by default.

Because both the FCC and the Third Circuit ruled on the underlying constitutional issues, and those issues are "fundamental to the further conduct of the case," those issues are fully ripe for this Court's review. *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945); *see also Gillespie v. United States Steel Corp.*, 379 U.S. 148, 153 (1964) (same); *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947) (same); *see generally* Stern, *supra*, § 4.18, at 259-60. Indeed, *NCCB* itself arose in this precise procedural posture, since the D.C. Circuit in that case partially affirmed and partially reversed the FCC's original cross-ownership restrictions, and remanded to the agency. *See* 555 F.2d 938, 966-67 (1977). Not surprisingly, a sizeable chunk of this Court's docket—in this current Term as well as any other Term—consists of cases in which the court below resolved a threshold legal question but remanded for further proceedings. *See, e.g., Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal*, No. 04-1084, *cert. granted*, 2005 WL 349538 (Apr. 18, 2005); *City of Rancho Palos Verdes v. Abrams*, 125 S. Ct. 1453 (2005); *Dura Pharms., Inc. v. Broudo*, 125 S. Ct. 1627 (2005); *National Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, No. 04-277, *cert. granted*, 125 S. Ct. 654 (2004); *Ashcroft v. Raich*, No. 03-1454, *cert. granted*, 124 S. Ct. 2909 (2004).[3]

Contrary to respondents' assertion, thus, Media General is not asking this Court "to entertain abstract issues of constitutional law." U.S. Br. 13-14. The proper constitutional

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[3] The United States' suggestion that review is unwarranted in this posture comes with particular ill grace, since the United States—probably more than any other litigant—routinely urges this Court to grant certiorari in cases in which the court of appeals has established the "legal framework" for a remand. Reply Br. for the U.S. at 8, *Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal*, No. 04-1084 (3/29/05) (cert. granted on Apr. 18, 2005); *see also* Reply Br. for the U.S. at 10, *United States v. Olson*, No. 04-759 (2/17/05) (cert. granted on Mar. 7, 2005).

standard of review governing particular types of official action does not present an "abstract" question; to the contrary, it presents a concrete question of the sort that this Court routinely addresses. *See, e.g., Johnson v. California*, 125 S. Ct. 1141, 1146 (2005) ("We granted certiorari to decide which standard of review applies" to a claim of racial discrimination in the prison context). All three of the questions presented in Media General's petition ask this Court to reconsider the deferential standard of review set forth in *NCCB* and duly applied by the agency and the Third Circuit below. Indeed, the fact that the Third Circuit decided the threshold constitutional questions, *see* Pet. App. 45-48a, even though it ultimately vacated and remanded the cross-ownership restrictions on administrative law grounds, *see* Pet. App. 48-66a, only underscores that the petition does not present "abstract issues." Because the extent of the FCC's constitutional latitude to impose cross-ownership restrictions is independent of (and logically and legally antecedent to) the proper scope of any particular restriction, no reformulation of the cross-ownership restrictions in any remand would affect the constitutional analysis.

Needless to say, respondents' insistence that the constitutional questions presented here are "settled" belies their suggestion that those questions are not yet ripe. Respondents, having prevailed on the constitutional issues below, may be happy to engage in a protracted game of constitutional hide-the-ball, but Media General is not—particularly since Media General's constitutional rights continue to be infringed by the cross-ownership restrictions, which not only prevent Media General from acquiring broadcast stations, but—unless waivers are granted—require Media General to divest existing properties.[4]

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[4] Respondents Prometheus *et al.* (but again, tellingly, not the United States) suggest that individual waiver proceedings "present a better vehicle for revisiting the constitutional issues" than this case. Prometheus Br. 17. That suggestion is baseless; if anything, the far-reaching constitutional issues

In any event, the United States' insistence that "[i]n the current posture of this case, ... there is an *unreversed* determination that the Commission failed adequately to justify the new rules under ordinary, nonconstitutional standards applicable to judicial review of administrative action," U.S. Br. 13 (emphasis added), makes no sense. Of course the Third Circuit's decision on the administrative law issues is "unreversed"; this Court has not yet had the chance to reverse it. But several of the petitioners and cross-petitioners here, *including the United States itself, see* Conditional Cross-Pet. for a Writ of Cert. at 19-28 (No. 04-1168); *see also* Pet. for a Writ of Cert. at 23-25 (No. 04-1045), have asked this Court to do just that. Accordingly, if this Court would like to consider the particular cross-ownership restrictions adopted by the FCC and reviewed by the Third Circuit, those restrictions are most certainly before the Court.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

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presented here are most naturally addressed in the context of a global rulemaking, not individual adjudications. Indeed, other self-described "public interest" groups (represented by respondents' counsel of record) have taken precisely the opposite position before the FCC, insisting that "[a] waiver pending rulemaking would amount to regulation by waiver, gutting the Commission's rulemaking process." Pet. to Deny, *In the Matter of Application for Renewal of Broad. Station Licenses*, FCC No. BRCT-20040802BIK (filed 11/1/04), at 32.

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